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SUPREME COURT OF TEXAS
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No. 19-0694

IN THE TEXAS SUPREME COURT

IN RE. C.J.C., RELATOR

Original Proceeding Arising Out of

the 16th Judicial District Court, Denton County

Cause No. 16-07061-16

(Honorable Sherry Shipman, Judge Presiding)

and the Second District Court of Appeals (No. 02-19-00244-CV)

BRIEF OF THE TEXAS ASSOCIATION OF FAMILY DEFENSE ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF RELATORS' PETITION FOR WRIT OF MANDAMUS

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The Texas Association of Family Defense Attorneys ("TAFDA") submits this Amicus Curiae Brief pursuant to Texas Rule of Appellate Procedure 11 and respectfully requests that it be received and considered by the Court.

INTEREST OF AMICUS CURIAE

The Texas Association of Family Defense Attorneys ("TAFDA") is a group of statewide attorneys focused on the defense of the family. Recently founded on February 22, 2020, TAFDA's mission is to preserve and advocate for the right to family integrity which is guaranteed by the Texas and United States Constitutions. We fulfill that mission by educating and training attorneys who represent parents and children in parental termination/child protection cases in which the State is involved; by equipping those attorneys with the information, skills, and tools necessary to be successful in the Courtroom; and by participating in the Legislative process to effect changes in the law that are beneficial to families. Through this cooperation, education, and assistance, TAFDA strengthens families through zealous advocacy.

In furtherance of that mission, the Texas Association of Family Defense Attorneys ("TAFDA") files this amicus brief in response to the brief filed by the Family Law Council and in support of Relator. Even though the State is not a party to this case, the State's overreaching involvement in this private custody case is concerning to TAFDA, and the issues involved in this case are some of the same

issues that arise in cases where the State is a party. TAFDA agrees with and adopts the arguments in the briefs filed by the Texas Public Policy Foundation, the Parental Rights Foundation, the Texas Attorney General, Voices for Choice, and the Alliance defending Freedom.

There were no costs or fees involved with the preparation of this brief.

I. SUMMARY OF THE ARGUMENT

Respondent abused her discretion and violated the Relator's constitutional rights by refusing to adhere to the "fit parent" presumption, which is a fundamental right granted to all parents under the Fourteenth Amendment Due Process Clause of the United States Constitution. *See Troxel v. Granville*, 530 U.S. 57 (2000). The Court in *Troxel* stated that parents have a *"*fundamental right to make decisions concerning the care, custody, and control of their children" and that "there is a presumption that fit parents act in the best interests of their children." *Troxel* 530 U.S. at 68.

Further, the Respondent erred when she injected her opinion of what she thought was in the best interest of the child, when the evidence in the record established that the father was a fit parent. The US Constitution requires that when a judge is making a best interest inquiry, the judge must assume that anything a fit parent is doing is in the best interest of the child. It is not up to the Court to make decisions regarding the child, unless the court determines that the parent is not fit.

See Troxel v. Granville, 530 U.S. 57 (2000) (*stating* "there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children") *Troxel* 530 U.S. at 58.

The evidence in the record overwhelmingly supports the fact that Relator is a fit parent, so there is only one correct conclusion in this case. The trial court abused its discretion, and mandamus should issue ordering Respondent to vacate the temporary order granting possessory conservatorship of C.C. to J.D.

II. ARGUMENT

A. This Court Should Apply the "Fit Parent" Presumption to Child Custody Modification Proceedings.

1. The "Fit Parent" Presumption

The Family Law Council's Brief acknowledges that there is "fit-parent presumption." Council's Brief at 11, 14-16. However, the Council's argument incorrectly asserts that the "fit-parent presumption" *only* applies "when grandparents, certain other relatives, and persons deemed to have substantial past contact with a child seek possession of or access to a child." Council's Brief at 11-12. The Council's argument fails because it does not recognize that the "fit-parent presumption" is a fundamental constitutional due process right that belongs to the parent. *Troxel v. Granville*, 530 U.S. 57 (2000).

Yes, the Texas legislature added the significant impairment requirement to Texas Family Code §§102.004 and 153.433 in response to *Troxel*, but that does not mean the due process inquiry ends there. Council's Brief at 15. It is illogical to think that a parent can lose a fundamental constitutional right simply because a "non-parent," other than a grandparent, files a custody lawsuit, or because it is a child custody "modification lawsuit" rather than an "original lawsuit."

A fit parent's constitutional rights are not protected by the application of Texas Family Code §§102.003(a)(9) or 102.003(a)(11) because those statutes do not specifically require the same "significant harm" analysis as Texas Family Code §§102.004 and 153.433. Therefore, in order to protect a parent's constitutional right afforded to him by the Due Process Clause of the Fourteenth Amendment, the Court must apply the "fit parent" presumption in cases without a prior finding of unfitness. If the "fit parent" presumption is not applied in those cases, the Texas Family Code standing statutes are unconstitutional, and must undergo a strict scrutiny analysis as several other briefs have already thoroughly argued.

2. Modification Proceedings

Unfortunately, the Family Law Council again misses the mark by launching into a discussion about how this is a modification proceeding, so neither the parental presumption from § 153.131, nor the "fit parent presumption" from § 153.433, apply. Council Brief at 16-21. Typically, modification proceedings are between

parents. So, what happens in a modification proceeding when there is a fit parent and a non-parent involved? The Family Law Council's reliance on *In re V.L.K.* to answer that question is misplaced. Council's Brief at 19. *In re V.L.K.*, 24 S.W.3d 338 (Tex. 2000).

Although the Council's Brief accurately argues that the statutory parental presumption, codified in Texas Family Code §153.131, does not apply to modifications, and cites to this Court's *In re V.L.K.* opinion for authority, their argument that the Constitutional "fit parent" presumption should also not be applied to modification lawsuits is absurd. The Fourteenth Amendment to the US Constitution protects the fit parent's due process rights to make decisions for his children, and does not delineate between original and modification proceedings. *See Stanley v. Illinois,* 405 U.S. 645, 651 (1972).

3. *In re V.L.K.* is distinguishable from the instant case.

Interestingly, if this Court looks to *In re V.L.K.* to support that the "fit parent" presumption should not apply in modification lawsuits, this Court will quickly find that the facts in Relator's case and the facts in *In re V.L.K.* could not be more different, and *V.L.K.* actually supports a finding that the "fit parent" presumption should apply in modification proceedings. *In re V.L.K.*, 24 S.W.3d 338 (Tex. 2000).

The Court, in *In re V.L.K.*, acknowledged that not applying the parental presumption in certain modification cases was appropriate when "this Court noted

that, after a court has awarded custody to a nonparent, a parent cannot merely show that she is a fit person to be entitled to custody. Instead, the court should order a change only when convinced that the change is a positive improvement for the child." *In re V.L.K.*, 24 S.W.3d 338, 342–43 (Tex. 2000). The Court then went on to hold that the parental presumption does not apply in modification proceedings, "because a change of custody disrupts the child's living arrangements and the channels of a child's affection, a change should be ordered only when the trial court is convinced that the change is to be a positive improvement for the child." *In re V.L.K.*, 24 S.W.3d 338, 342–43 (Tex. 2000).

However, wholly different from the case at bar, *V.L.K.* involved a mother who had shot and killed the child's father, and who had voluntarily relinquished custody rights to her mother. *In re V.L.K.*, 24 S.W.3d 338, 340 (Tex. 2000). *V.L.K.'s* mother filed an agreed decree naming V.L.K.'s grandmother as Managing Conservator of the child, and naming herself as Possessory Conservator. *In re V.L.K.* at 340. The Aunt and Uncle, the Hickes, who were actually caring for the child when the agreed decree was entered, later filed for a modification and asked to be named Joint Managing Conservators of the child. They argued that the parental presumption did not apply in modification lawsuits where a non-parent had previously been awarded custody. *In re V.L.K.* at 341. This Court agreed with the Hickes' argument, and the

"rule of law" that the "parental presumption" does not apply in modification cases was born. *Id* at 343.

Even though the facts in *In re V.L.K.* are significantly different than the facts in Relator's case, in that Relator is a biological father that has proven himself to be a "fit parent," and he has not previously relinquished his custody rights to a non-parent, he is still required to share custody of his daughter with another person, who is not even related to the child, who has had minimal contact with the child, and whom the child is not interested in spending time with, while the maternal grandparents were dismissed from the modification law suit for lack of standing. *In re Clay*, 2019 WL 545722, at *9 (Tex. App.—Fort Worth Feb. 12, 2019, no pet.). That doesn't seem to make much sense. Of course, *In re V.L.K.* was decided months before *Troxel* was decided, and seeing as how the *V.L.K.* court did not mention *Troxel*, one can presume that the Court did not take the arguments from *Troxel* into account when rendering its decision. *In re V.L.K.*, 24 S.W.3d 338 (Tex. 2000).

Therefore, this Court should clarify that the holding in *V.L.K.*, that the parental presumption does not apply in modifications, *only* applies to those modification proceedings where there has been a previous order granting custody to a non-parent. Additionally, because the fit parent presumption crafted by *Troxel* had not yet been devised, this Court should clarify that the "fit parent" presumption applies in all modification proceedings where the facts establish that the parent is fit.

B. The "Fit Parent" Presumption Requires the Judge to Assume a Fit Parent is Acting in the Best Interest of the Child and the Trial Court Cannot Substitute Its Own Judgment.

1. The law presumes that a fit parent acts in the best interest of the child.

The Family Law Council asserts in their brief that the best interest determination is a fact specific inquiry that is left up to the trial court. Council Brief at 12. They argue that Texas Family Code § 156.101 does not preclude judges from considering or deferring to the wishes of the child's parents when determining the best interest of the child. Council's Brief at 23-24.

Once again, the Council's arguments fail. Once the facts have established that a parent is fit, the law presumes that the best interest determination is made by the parent. A fit parent's decision regarding who their child may spend time with should be honored unless there is a compelling reason not to honor it. "*Troxel* makes clear the trial court must accord significant weight to a fit parent's decision about the third parties with whom his or her child should associate." *In re Pensom*, 126 S.W.3d 251, 256 (Tex. App.—San Antonio, 2003).

As recently restated by this Court in *In re N.G.*, "One of the most fundamental liberty interests recognized is the interest of parents in the care, custody, and control of their children." *In re N.G.*, 577 S.W.3d 230, 235 (Tex. 2019). The State should not interfere with a parent's fundamental liberty interest unless the infringement is narrowly tailored to serve a compelling state interest. *See Reno v. Flores*, 507 U.S.

292, 295 (1993). Accordingly, the State should not interfere with the father's rights to determine what is in his daughter's best interest, unless narrowly tailored to serve a compelling state interest, and in this private custody case, the state has no interest, much less a compelling one.

2. The trial court cannot substitute its judgment for that of a fit parent.

The Respondent abused her discretion when she substituted her opinion and judgment for the decisions of the father. The Respondent not only substituted her judgment, but went so far as to say, in so many words, that she was going to determine the best interest of the child whether the father agreed or not. This she cannot do.

This Court has held that the state may not "infringe on the fundamental rights of parents to make child rearing decisions simply because a state judge believes a 'better decision' could be made." *In re Derzapf*, 219 S.W.327, 333 (Tex. 2005). *See also In re Scheller*, 325 S.W.3d 640, 642 (Tex. 2010). A fit parent is presumed to act in his or her child's best interest. *Id.* Deference to a fit parent is guaranteed by the Fourteenth Amendment, even when parents are not perfect or ideal, and a fit parent's decisions regarding their children cannot be overruled. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Therefore, the Constitution requires that when a judge is making a best interest inquiry, the judge must assume that whatever the parent is doing **is** in the best interest of the child, unless the fit parent presumption,

as crafted by *Troxel,* is overcome. Once a parent is deemed fit, that should be the end of the inquiry.

CONCLUSION

The Respondent abused her discretion and violated Relator's constitutional rights when she ignored the "fit parent" presumption, injected her own opinion into the best interest analysis, when it was obvious that Relator is a fit parent, and awarded possessory conservatorship and parental possessory conservatorship rights to an unrelated non-parent, over the objections of Relator. If this decision is allowed to stand, what happens when ex-girlfriends, ex-boyfriends, nannies, and babysitters want the same possessory rights? That is a scary thought for parents everywhere. As long as a parent is fit, and capable of making decisions, the Constitution, as well as moral and natural law, presume that parents make decisions in the best interest of their children.

Therefore, mandamus should issue ordering Respondent to vacate the temporary order granting possessory conservatorship of C.C. to J.D.

Respectfully Submitted,

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In accordance with Texas Rules of Appellate Procedure 9.4 (2)(b), I certify that this document contains two thousand nine hundred and ten (2,910) words.

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